91-672

No. 91-



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

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NEW YORK CITY HEALTH AND HOSPITALS CORPORATION; HARLEM HOSPITAL CENTER; COLUMBIA UNIVERSITY COLLEGE OF PHYSICIANS AND SURGEONS; and DR. R. LINSY FARRIS,

Petitioners,

-against-

DR. IFEOMA EZEKWO,

Respondent.

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

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October 25, 1991

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## QUESTIONS PRESENTED

1. Has a medical resident been deprived of a constitutionally protected property interest when she has been denied the opportunity to serve as chief resident in rotation for a four month period when the resident was allowed to complete her residency and has begun a medical practice in the specialty of her choice, and the resident did not show that the denial of the chief residency has interfered with her career plans in any tangible way, and the Second Circuit found that the only "actual damage" suffered by the resident was a salary differential of $675.00?

2. Assuming arguendo that the above-described resident was deprived of a property interest, was due process satisfied when the decision to deny her the chief residency was made for academic reasons and was made after faculty members carefully considered the resident's performance and test scores over a two year period?

## PARTIES

The parties in this case are:

1. The New York City Health and Hospitals Corporation;

2. Harlem Hospital Center (a division of the New York City Health and Hospitals Corporation);

3. The Columbia University College of Physicians and Surgeons (a division of Columbia University, which was incorporated in 1810 as "The Trustees of Columbia University in the City of New York");

4. Dr. R. Linsy Farris;

5. Dr. Ifeoma Ezekwo.

Parties 1, 2, 3, and 4 were defendants when this case was commenced and are petitioners before this Court. Party 5 was the plaintiff when this case was commenced and is respondent before this Court. Party 1, the New York City Health and Hospitals Corporation, has the following corporate subsidiaries: Nurse Referrals, Inc., and Outpatient Pharmacies, Inc. Party 3, Columbia University, has the following corporate subsidiaries: Aethelstane, Inc., Camp Columbia, Inc., Morningside Heights

Legal Services, Inc., Reid Hall, Inc., The Columbia University Presbyterian Medical Center Fund, Inc., and University Women's Realty Corporation.

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DR. R. LINSY FARRIS,

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

The petitioners, the New York City Health and Hospitals Corporation, Harlem Hospital Center, the Columbia University College of Physicians and Surgeons, and Dr. R. Linsy Farris, respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of

Appeals entered in the above entitled proceeding on August 1, 1991.

## OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York has not been officially reported. A copy is reprinted in the Appendix to this petition at page A1. The opinion of the United States Court of Appeals for the Second Circuit is reported at 940 F.2d 775. A copy is reprinted in the Appendix to this petition at page A15.

## JURISDICTION OF THIS COURT

The judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was dated and entered August 1, 1991. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1254(1). This petition has been filed within the time allowed by law.

## CONSTITUTIONAL PROVISION

Section 1 of the 14th Amendment to the Constitution of the United States of America states:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

### Introduction

Respondent Dr. Ifeoma Ezekwo (hereafter "respondent") was a resident in the ophthalmology program at Harlem Hospital. She completed the program, is eligible to take the examinations for board certification, is licensed to practice ophthalmology, and has an ophthalmology practice.

In this action, petitioner alleged that she was wrongfully denied an opportunity to serve as chief resident for the four month period from November 1987 through February 1988. She alleged that she was denied the chief residency in retaliation for first amendment activity and that the denial of the chief residency was a deprivation of both liberty and property without due process of law.

After a bench trial, the District Court rejected all of her claims. On appeal, petitioner abandoned her liberty interest claim. The Second Circuit unanimously rejected respondent's first amendment claim and divided with respect to her deprivation of property without due process claim. The majority reversed the District Court with respect to this claim and the dissent said that plaintiff had no constitutionally protected property interest in the chief

residency, and, even if she did, she received due process.

## Basis for Federal Jurisdiction

The District Court had jurisdiction over this case pursuant to 28 U.S.C. §§ 1343 (3) and (4).

## Statement of Facts

### The Ophthalmology Residency Program at Harlem Hospital Center

The Ophthalmology Department of Harlem Hospital Center is run and staffed by the College of Physicians and Surgeons of Columbia University. Harlem Hospital is a unit of the New York City Health and Hospitals Corporation (HHC) and Columbia has a contract with HHC to operate the Department (JA147, JA492, JA503).[1] The

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[1] Numbers in parentheses preceded by "JA" refer to the pages of the Joint Appendix that was filed in the Second Circuit. Numbers in parentheses preceded by "A" refer to the pages of the Appendix that accompanies this Petition.

residency program is three years long and has nine residents, three in each year of training (JA483, JA492, JA503). Residents learn to diagnose and treat eye disorders through lectures and the treatment of patients under the supervision of attending physicians (JA195-197, JA492-496, JA503-504). Attending physicians are board certified ophthalmologists (JA197).

Dr. Farris was chief of the department, Dr. Jordan was in charge of the attending physicians, and Dr. Delerme was in charge of the residents (JA151-152).

Respondent Joins the Ophthalmology Department of Harlem Hospital Center

Respondent commenced her residency in July 1985 (JA31, JA40). She was accepted after applying twice (JA31, JA37, JA449). The entering class that she joined consisted of herself, Dr. Solomon and Dr. Castillo (JA40). Her first application was rejected (JA28, JA201). Dr. Farris helped respondent to get accepted after her second

application (JA31, JA38, JA148, JA202-203, JA204). Dr. Farris was aware that respondent had had interpersonal problems in other departments of the hospital, but he was optimistic that these problems would diminish when she began training in the specialty of her choice (JA449).

The Chief Residency

The chief resident helps other residents resolve problems involving patient care and helps resolve disputes among residents or between residents and attending physicians (JA199-200). The chief resident also presents patients at Friday morning rounds (JA199) and helps to organize conferences and lectures (JA200). Dr. Farris testified that the chief resident does not assign cases (JA198-199), but respondent testified otherwise (JA84, JA104). As chief resident for four months, respondent would have received an additional $675.00 in salary (JA618).

From the early 1980's until October 1987, when respondent was about to become chief resident, each third year resident became chief resident for four months (JA150-151). This policy was set forth in brochures and the ophthalmology department's manual (JA150, JA492, JA503). None of the written contracts that governed respondent's relationship with Harlem Hospital guaranteed that she would become chief resident in her third year (JA102-103, JA609-665, JA753-756).

Respondent testified that she applied to the residency program at Harlem Hospital in part because it offered the opportunity to rotate as chief resident (JA120). Being a chief resident is a not a prerequisite for licensure, or board certification (JA130). It is not a prerequisite for being accepted as a postgraduate fellow (JA312), but a hospital might consider whether an applicant was a chief resident along with one's other

qualifications when deciding whether to accept the applicant as a fellow (JA260).

Plaintiff's Written Complaints and Memoranda Prior to October 16, 1987

During the period between the commencement of respondent's residency and the announcement that she would not be chief resident, respondent wrote a series of memoranda that attacked the personal and professional integrity of her teachers and fellow residents. She accused her teachers and fellow residents of being lazy, incompetent, and unconcerned about the welfare of their patients (JA405, JA410-421, JA444-446, JA469-481, JA580).

The Decision Regarding Respondent and the Chief Residency

Dr. Farris testified that he first began considering changing the chief residency system and going from a rotational system to a selection process in April, 1987 because of problems he was having with Dr. Seward, who was chief resident at the time

(JA221-222). Dr. Farris testified that in June or July of 1987, he, Dr. Delerme and Dr. Jordan discussed the possibility of not making respondent chief resident (JA178).

Junior residents were evaluated by senior residents and attending physicians JA(212-213). A resident's official evaluation was the evaluation that Dr. Farris signed (JA250). When evaluating a resident, Dr. Farris took into account his own observations and the evaluations of others (JA255). Respondent and Dr. Solomon were each evaluated by Dr. Farris and Dr. Delerme on June 19, 1987. The evaluations were done on a scale of 1 to 9. 1 to 3 was unsatisfactory, 4 to 6 was satisfactory, and 7 to 9 was superior. Respondent received an overall rating of 5.5 and Dr. Solomon received an overall rating of 6.5 (JA553, JA805). They received the following ratings in the following subcategories (JA550-553, JA802-805):

| Respondent | |
|---|---|
| Category | Score |
| Medical Knowledge | 6 |
| Medical History | 7 |
| Examination Skills | 6 |
| Ophthalmic Procedures | 5 |
| Medical Judgment | 6 |
| Surgical Judgment | 5 |
| Surgical Skills | 3 |
| Personal Qualities | 5 |
| Attitudinal Qualities | 5 |

| Dr. Solomon | |
|---|---|
| Category | Score |
| Medical Knowledge | 5 |
| Medical History | 6 |
| Examination Skills | 7 |
| Ophthalmic Procedures | 6 |
| Medical Judgment | 5 |
| Surgical Judgment | 6 |
| Surgical Skills | 7 |
| Personal Qualities | 7 |
| Attitudinal Qualities | 8 |

The American Academy of Ophthalmology administers the OKAP examination (JA205). It tests residents' knowledge of ophthalmology (JA206-207). A resident's performance on the examination is compared with the performance of other residents with the same amount of training throughout the United States who took the same examination

(JA207). One is not required to obtain a minimum OKAP score in order to graduate from a residency program (JA79). Harlem Hospital ophthalmology residents have historically not done well on the OKAP examination (JA79-80, JA164-165). Respondent took the examination in the spring of 1986 and in the spring of 1987 (JA78). Her performance was in the lowest 1 percentile in 1986 and the lowest 6 percentile in 1987 (JA757-758). This means that 99% of the first year residents who took the exam in 1986 did better than she and 94% of the second year residents who took the exam did better in 1987 (JA207). In contrast, Dr. Solomon was in the 47 percentile in 1986 and in the 39 percentile in 1987 (JA757-758).

Every six weeks, the attendings would meet and discuss the residents (JA220). During these meetings, several attendings complained about respondent. They stated

that her surgical ability was inferior to that of the other residents and that she disagreed and argued with what they were trying to teach her (JA219). She would not do as she was told during surgery and, when a procedure was not going well, she would resist when the supervising attending would try to take over. Dr. Moazed testified that respondent had poor surgery skills and that respondent was not made chief resident because of her poor relations with others, her surgical skills, and her OKAP scores (JA306-308, JA331).

Several attending physicians wrote memoranda to Dr. Farris that were highly critical of respondent's surgical skills, medical knowledge, attitude, and her inability to get along with others (JA482, JA775, JA776-780, JA781-784).

In August or September of 1987, the attending physicians met and discussed whether respondent should succeed

Dr. Solomon as chief resident. The final decision rested with Dr. Farris, but the consensus was that Dr. Solomon should continue as chief resident (JA164-JA168, JA222). The attending physicians liked Dr. Solomon. He had good OKAP scores, good evaluations, and he got along with others well (JA222, JA331).

On October 16, 1987, Dr. Farris attended a meeting with the dean of the affiliation, the director of personnel for Columbia, and Dr. Delerme, Dr. Gonzalez, Dr. Bansal, and Dr. Tiwari. They were concerned with respondent's lack of surgical and interpersonal skills. They discussed dropping her from the program and not making her chief resident (JA176-JA178). Plaintiff's memoranda complaining about the program were discussed at this meeting (JA185, JA226). Dr. Farris was troubled by these memoranda because they contained such vicious personal attacks on the

attending physicians. In Dr. Farris' view, respondent stretched the truth and did not know the difference between an honest difference of opinion and malpractice (JA227). Dr. Farris testified that respondent's attacks on her colleagues had a deleterious effect on the collegiality of the department (JA229-230).

The decision to go from a rotational system of choosing residents to a selection process based on merit was announced in a memorandum dated October 16, 1987 (JA459). This memorandum states (JA459):

> Emmanuel R. Solomon has accepted the appointment of Chief Resident in the Department of Ophthalmology to continue during the next four month resident rotation, November 1987 thru February 1988. His appointment represents a change in the previous practice of having every resident in Ophthalmology serve as Chief Resident for a four month rotation. We anticipate this change to improve the residency program as a result of the Chief Resident being selected on the basis of residency training evaluation, test scores and ability demonstrated in administration and leadership.

Dr. Farris testified about the relevance of the selection factors mentioned in the memorandum. OKAP test scores indicate the degree to which a resident has mastered the "book knowledge" of ophthalmology, and evaluations indicated the degree to which the practical skills of examination and surgery have been mastered (JA229). Dr. Farris said that the chief resident should excel or at least be above average in these areas so that he or she can serve as a model for the other residents (JA229). Dr. Farris said that a resident should have good leadership skills so that he can resolve conflicts among the residents and persuade them to accept department policies (JA229). Dr. Farris said that a chief resident should be able to get along with the attending physicians and residents in order to minimize personal conflicts that might get in the way of patient care and educational goals (JA200-201).

Respondent testified that, in June of 1987, she was told that she would be chief resident from October 1987 through February 1988 (JA74, JA187). Respondent said that she did not learn that she would not be chief resident until the end of October, 1987 (JA99-102, JA183).

Dr. Castillo was also not made chief resident. Dr. Moazed testified that this was because Dr. Castillo was chronically late for clinics and lectures (JA329-330).

Events Following Plaintiff's Graduation from the Residency Program

Respondent graduated from the residency program in June, 1988 (JA110, JA122). Upon graduation, respondent received a letter from Dr. Farris stating that she completed the program. This letter qualifies her to take the examinations for Board certification (JA129-130). She is not board certified because she has not taken the examinations (JA131).

Since 1984, she has maintained a medical practice at an office located at 2685 Grand Concourse. Her practice started as an internal medicine practice. In 1988, she added ophthalmology to her practice (JA27). She is licensed to practice ophthalmology (JA130).

Respondent has had difficulty in obtaining post graduate fellowships and admitting privileges at hospitals, but there is no evidence that these difficulties can be attributed to the fact that she was not appointed chief resident (JA110-111, JA125, JA314, JA341-343, JA670, JA681, JA709).

## Decisions Below

### Decision of the District Court

The District Court stated that respondent alleged that the decision to not make her chief resident gave her three causes of action. The Court said that respondent alleged the following: (a) She was denied the chief residency in retaliation

for her complaints against the residency program in violation of the her first amendment rights. (b) The denial of the chief residency deprived her of property without due process. (c) The denial of the chief residency deprived her of liberty without due process (A3-4). The Court addressed each claim in turn.

The Court held that respondent did not demonstrate a valid first amendment claim because her complaints did not constitute expression protected by the first amendment because they were overwhelmingly personal grievances and personal attacks on other individuals rather than remarks aimed at broad public concerns (A4-6). The Court also found that "the action by Dr. Farris was not motivated by [respondent's] complaints" (A6).

The Court held that respondent did have a constitutionally protected property interest in being appointed chief resident,

even though the contracts she signed made no reference to chief residency, because the brochure that the program issued referred to a rotation as a chief resident, and therefore, respondent had more than a unilateral expectation of becoming chief resident (A7-8). However, the Court found that respondent was not deprived of property without due process because she received due process. The Court found that the determination to not make her chief resident was based on deficiencies in her performance as a resident, primarily in the area of interpersonal relationships and her low OKAP scores. Therefore, the decision was academic and not disciplinary in nature and respondent was not entitled to a formal notice or hearing (A8-10).

The Court found that the decision to not make respondent chief resident did not deprive her of a constitutionally protected liberty interest. It found that the decision

to not make respondent chief resident did not implicate a liberty interest because it did not stigmatize her or make it impossible for her to gain employment in the future. It found that the chief resident position is purely administrative and that, while having been a chief resident may enhance one's opportunities somewhat, the failure to have served as chief resident does not impugn one's abilities as a physician or foreclose job opportunities (A10-11).

Decision of the Circuit Court

The Majority

After summarizing the facts (A16-32), and affirming the District Court's rejection of respondent's first amendment claim (A34-40), the majority proceeded to discuss her due process claim.

First the majority said that, although neither respondent's individual written contracts nor the collective bargaining agreement that covered respondent mentioned

any right to the chief residency, respondent had an implied contractual interest in becoming resident (A42-A43). The majority then acknowledged that not every contractual employment benefit is a constitutionally protected property right (A43-44), but said that respondent's right to be chief resident was not as trivial as those employment benefits which have been held to not be constitutionally protected (A45). The majority said that respondent's interest in the chief residency was more than merely financial (A47-48). [2] It said that this

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[2] The majority did not reconcile this statement with the following statement made later in its opinion (A59):

> The only evidence of actual damage suffered by [respondent] as a result of the deprivation of [the chief residency] was the loss of the pay differential that accompanied the designation of Chief Respondent. On remand, therefore, the district court's damages inquiry should be limited to that amount.

(Footnote Continued)

designation is important because it denotes the culmination of years of study[3] and is necessarily a position that an individual can occupy only once (A48).

Although bound by the District Court's finding that respondent was denied the chief residency for academic reasons under the "clearly erroneous" standard of review (A32-33), the majority expressed its skepticism with regard to this finding (A53). Nonetheless, the majority held that, even if the decision was academic in nature, respondent did not receive due process. The majority distinguished this Court's

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(Footnote Continued)
As chief resident for four months (JA150-151), respondent would have earned an additional $675.00 (JA618).

[3] The majority did not explain why respondent's graduation from the residency program was not itself sufficient evidence of her years of study, where the chief residency was awarded on a rotational basis and not by merit, and hence, merely denoted that a resident had reached the third year of residency.

decision in Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78 (1978), on the grounds that in this case, respondent was denied the chief residency on the basis of new criteria for the position of chief resident. The majority said that respondent should have been informed in advance of the intention to change the criteria and should have been given the opportunity to argue that (a) the criteria should not be changed, or (b) that the criteria should not be changed until after she served as chief resident, as she had been promised, or (c) that she was qualified to serve as chief resident under the new criteria (JA56-57).

In remanding the case back to the District Court, the majority said that since the only evidence of actual damage suffered by the respond was the loss of the pay differential that chief residents' received,

the District Court's damages inquiry should be limited to calculating that amount.

The Dissent

The dissent began by saying that although the majority gave "lip-service" to the principle that it was bound by the factual findings of the District Court, the majority gave "short shrift" to the District Court's finding that the chief residency determination was academic rather than disciplinary, a finding which the dissent said was "solidly supported by the record" (A62-64).

Although respondent had an implied contractual interest in becoming chief resident, not every deprivation of a contractual employment benefit is a deprivation of property within the meaning of the due process clause (A67). The dissent cited several cases in support of the proposition that breaches of a public employment contract that do not involve a

loss of employment do not implicate the due process clause (A67-70). While respondent's interest in becoming chief resident in rotation for four months was not as trivial as an interest as taking one's vacation at a particular point in time, her interest in the chief residency was in no way comparable to a loss of employment (A74). Losses of employment benefits short of termination itself should not be considered deprivations of property because " '[t]the federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies.' Bishop v. Wood, 426 U.S. 341, 349" (A74-75).

It was particularly inappropriate to find a property right in this case because of its academic context (A75). The dissent said that it was unwise to hold that a change in academic policy implicates students' property

interest, because such a holding impedes academic change (A76-77).

The dissent stated that, even if it agreed that respondent was deprived of a property interest, she had no federal claim because she was not denied due process. If respondent did have a property interest, it was a decidedly minor interest, and "in the wake of the Supreme Court's decision in Horowitz, supra, I think it is treading on thin ice to impose additional procedural requirements in the context of an academic decision such as this one" (A78-79). The dissent noted that in Horowitz, a student was dismissed from medical school, and therefore suffered a much greater deprivation than respondent did, but nonetheless this Court was reluctant to interfere in academic affairs and it stated that a formal hearing was inappropriate in the academic context (A79-82). The dissent rejected the majority's attempt to distinguish

Horowitz and said that although the student in Horowitz received more process than respondent, the deprivation in Horowitz was far greater (A82).

The dissent also noted that state law gave respondent a vehicle for challenging the denial of the chief residency in the form of an Article 78 proceeding or a contract action. Since, in this case, if a property interest was involved, it was a minimal interest at most, and therefore, a post-deprivation remedy would satisfy due process (A86). The dissent cited this Court's decision in Ingraham v. Wright, 430 U.S. 651 (1977), for the proposition that due process does not require a pre-deprivation hearing in every instance (A85-86).

Finally, the dissent stated that it agreed with the majority that it was unlikely that additional process would have changed the result here, and under this Court's

decision in Mathews v. Eldridge, 424 U.S. 319 (1976), this supported its view that additional process would only impose an unnecessary administrative burden.

**REASONS FOR GRANTING THE WRIT**

The majority decision in this case conflicts with decisions of the First, Third, Fifth, Sixth, Seventh, and Eleventh Circuits, insofar as the majority held that a public employee has been deprived of constitutionally protected property interest when that employee is denied a temporary four month promotion that would not have signified that the employee had any special merit and would have resulted in an earnings differential of $675.00.

In addition, the majority decision conflicts with this Court's decision in Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78 (1978), and with decisions of the Third, Fifth, Sixth and Eighth Circuits, insofar as the majority held

that a medical resident is denied due process when she is denied a temporary four month promotion that would not have signified that she had any special merit and would have resulted in an earnings differential of $675.00, when the denial is based on the resident's test scores, clinical performance and interpersonal behavior over a two year period, and the decision was carefully considered by the faculty of the residency program.

> **1. The majority decision conflicts with decisions of the First, Third, Fifth, and Sixth Circuits, insofar as the majority held that an employee has been denied a constitutionally protected property right when the employee has neither been discharged, nor permanently demoted, but has instead been denied a relatively minor benefit that consisted of an implied contractual promise to give the employee a four month rotation in a position that carried with it supervisory duties and a slight increase in pay.**

The majority held that respondent had an implied contractual right to be chief resident for four months, and that this

implied contractual right was a constitutionally protected property interest. This holding is unsupported by the decisions of this Court and is contrary to the decisions of other federal courts.

As the dissent below noted, this Court has never recognized any property interest in the employment context other than an interest in employment itself (A70-71). Furthermore, many circuit and district courts have held that, although a contractual guarantee of employment tenure will give rise to a property interest in employment itself, contractual employment benefits other than tenure do not give rise to a property interest in those benefits. Dorsett v. Board of Trustees, 940 F.2d 121, 123 (5th Cir. 1991); Greenberg v. Kmetko, 840 F.2d 467, 475 (7th Cir. 1988); Carter v. Western Reserve Psychiatric Habilitation Center, 767 F.2d 270, 272, n. 1 (6th Cir. 1985); Brown v. Brienen, 722 F.2d 360, 364-365, 360 (7th

Cir. 1983); Casey v. DePetrillo, 697 F.2d 22, 23 (2d Cir. 1983); Bleeker v. Dukakis, 665 F.2d 401, 403 (1st Cir. 1981); Farkas v. Ross-Lee, 727 F. Supp. 1098, 1103-1105 (W.D. Mich. 1989), aff'd without op'n, 891 F.2d 290 (6th Cir. 1989); Rode v. Dellarciprete, 646 F. Supp. 876, 880 (M.D. Pa. 1986), rev'd in part on other grounds, 845 F.2d 1195 (3d Cir. 1988). If this were not so, then federal courts would become enmeshed in every trivial dispute that can arise in the public employment arena. Kmetko, supra, 840 F.2d at 475; Brown, supra, 722 F.2d at 365.

The majority below paid lip service to the foregoing precedents (A43-44), but then proceeded to ignore them. It held that respondent's interest in becoming chief resident in rotation for four months was a constitutionally protected property interest, but it did not adequately explain why this was so in light of the fact that, by the

majority's own account, the only "actual damage" that respondent proved was the pay differential that respondent would have received as chief resident (A59), which the record shows was a total of $675.00 (JA150-155, JA618).

Much of the majority's discussion of the importance of respondent's interest in the chief residency did not establish its importance at all. The majority took great pains to establish the reasonableness of respondent's expectation that she would become chief resident (A46-47). This discussion, however, only establishes that respondent had an implied contractual interest in the position. It does not establish that this interest was so substantial that an ordinary contract action in state court was not adequate for its protection and, instead, it warranted constitutional protection.

The majority said that the chief residency was of special importance because it denoted the culmination of years of study (A48). However, respondent's graduation from the residency program itself denoted the culmination of years of study. To the extent that she wanted the chief residency for this purpose, the chief residency was redundant. To be sure, if the chief residency were awarded on the basis of merit, it would denote more than mere years of study, but the alleged property right at issue here is the right to be chief resident in rotation, regardless of merit.

Respondent completed the residency program, is eligible for board certification, is licensed to practice ophthalmology, and is in fact practicing this medical specialty (JA27, JA110, JA122, JA129-131). As the majority held, respondent did not show that she was damaged by the failure to make her chief resident beyond the loss of the salary

differential (A59). Therefore, there is no basis for the majority's statement that the interest at stake was "of significant professional value."

Aside from losing $675.00, all that respondent lost as a result of not being made chief resident was the opportunity to discharge some supervisory duties for a four month period. The Third and Eleventh Circuits and two District Courts have held that contractual interests that were more important than the chief residency here were not constitutionally protected property interests.

In Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), this Court noted that depriving a person of a job is a particularly severe deprivation, because a discharged employee has been separated from his livelihood, and may have difficulty in finding new employment. Id. at 543. In this case, respondent has not been cut off

from her means of livelihood. On the contrary, she graduated from the residency program and went on to an active ophthalmology practice.

In Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985), Justice Powell, in a concurring opinion, stated that a student's claim that his contractual right to remain in a six year university program leading to a joint undergraduate and medical degree gave him a property right was "dubious at best". Id. at 229. If the claim that remaining in a degree program is a property right is "dubious at best", it then follows that respondent's claim to a property right is utterly baseless, since she was allowed to complete her residency and was only denied a short stint as chief resident.

In Unger v. National Residents Matching Program, 928 F.2d 1392 (3d Cir. 1991), a physician had applied to Temple

University Hospital in order to be accepted as a resident in dermatology. She was accepted for a residency which was to begin in July, 1989. Temple discontinued its residency program in dermatology before the physician began her residency and it was impossible for the physician to gain acceptance in another residency program that would commence in 1989. The Court held that the physician's contractual right to commence her residency at Temple was not a protected property right. Id. at 1399. The plaintiff in Unger had to postpone her training and career as a dermatologist for one year. Respondent herein did not have to postpone her career plans for one minute. If the plaintiff in Unger did not have a property interest, then surely respondent does not.

In Todorov v. DCH Healthcare Auth., 921 F.2d 1438 (11th Cir. 1991), the Court stated that a physician has not been

deprived of a property right when the physician has been denied hospital staff privileges if the denial has not seriously limited the ability of the physician to engage in private practice. Id. at 1464. The Court applied this principle to deny the due process claim of a neurologist who wanted radiology privileges at a hospital in order to further his neurology practice. Id. Here, there is no evidence that the denial of the chief residency has seriously limited respondent's ability to practice ophthalmology.

In Faucher v. Rodziewcz, 891 F.2d 864 (11th Cir. 1990), a change in hospital procedures had the practical effect of reducing the volume of work that went to an anesthesiologist who had been practicing at the hospital for years. The Court, in rejecting the anesthesiologist's due process claim, said, "[W]e do not wish to transform the economic value of medical staff privileges

into a protected property interest." Id. at 869 (emphasis in original) (footnote omitted). Here, there is no evidence that the economic value of respondent's ophthalmology practice has been diminished in any way by the denial of the chief residency.

In Warfield v. Adams, 582 F. Supp. 111 (S.D. Ind. 1984), the Court held that an elementary school principal who is demoted to the position of first grade teacher is not deprived of a property right even if she had a contract as principal because she has not been discharged from employment and is free to pursue her contractual claims in state court. Respondent's interest here is clearly less significant than the interest of the principal in Warfield.

In Rode v. Dellarciprete, 646 F. Supp. 876 (M.D. Pa. 1986), rev'd in part on other grounds, 845 F2d 1195 (3d Cir. 1988), the Court held that the plaintiff did not allege a deprivation of a property right when she

alleged that she had been transferred to a new department, been assigned demeaning tasks, been deprived of training, been made the subject of derogatory remarks, and been deprived of her office and filing cabinet. Id. at 880. Surely, the cumulative effect of the above actions would have more impact than the denial of the chief residency had on respondent.

Finally, we wish to note that the majority's willingness to find a property right here despite the insubstantial nature of the interest involved is particularly disturbing because the decision to deny respondent the chief residency was an academic decision. "[T]his case arises in an academic context where judicial intervention in any form should be undertaken only with great reluctance." Doherty v. Southern College of Optometry, 862 F.2d 570, 576 (6th Cir. 1988), cert. denied, ___ U.S. ___, 110 S. Ct. 53 (1989); see, Regents of the

University of Michigan v. Ewing, 474 U.S. 214, 226 (1985); Dorsett v. Board of Trustees, 940 F.2d 121, 123 (5th Cir. 1991).

**2. The majority decision conflicts with this Court's decision in Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78 (1978), and with decisions of the Third, Fifth, Sixth and Eighth Circuits, insofar as the majority held that the careful evaluation of respondent's test scores and performance as a resident, which preceded the academic decision to not make her chief resident, did not satisfy due process.**

Even if it is assumed, arguendo, that respondent did have a property interest, then the decision of the majority is still incorrect because respondent received all of the process that was due her.

The District Court found that the respondent was denied the chief residency out of academic concerns rather than for punitive reasons (A9). This finding was well supported in the record (JA164-168, JA176-178, JA185, JA200-201, JA219, JA220,

JA222, JA226-231, JA306-308, JA323-324, JA331).

In Board of Curators, this Court held that a medical student who was dismissed from a public university was not denied due process even though she did not receive a traditional hearing. The faculty of the medical school was not satisfied with the student's performance. Id. at 81. Before dismissing her, the faculty "tested" her by having her work with seven area physicians. Two recommended graduation, two recommended dismissal and three recommended probation. Id. at 81. The university decided to dismiss the student, and adhered to its decision after the student appealed in writing. Id. at 82. Assuming, without deciding, that the student had a constitutionally protected property or liberty interest, this Court decided that she had been afforded as much due process as the constitution required. Id. at 84-85. This

Court distinguished its prior decision of Goss v. Lopez, 419 U.S. 565 (1975), on the grounds that Goss involved a disciplinary suspension for a specific wrongful act. Id. at 85-86. It held that a hearing during which a student can present his side of the issue is not required when an academic determination is being made because such a determination is subjective, cumulative, and evaluative. Id. at 89-90. In a footnote, it was noted that, in the case of a medical student, the fact that the university's decision may turn on elements of personal behavior, such as hygiene or punctuality, do not make it any less academic. Id. at 91, n. 6.

The principles that this Court enunciated in Board of Curators have been applied by several federal courts. Hankins v. Temple University, 829 F.2d 437 (3d Cir. 1987) (informal evaluation procedure satisfies due process when physician is terminated

from fellowship program at university hospital); Mauriello v. University of Medicine and Dentistry of New Jersey, 781 F.2d 46 (3d Cir. 1986), cert. denied, 479 U.S. 818 (1986) (informal academic evaluations of a graduate student's work satisfy due process when student is dismissed from graduate program); Miller v. Hamline University School of Law, 601 F.2d 970 (8th Cir. 1979) (student who has been dismissed from law school for academic reasons has no right to appear before the board that considered and denied his application for readmission); Mohammed v. Mathog, 635 F. Supp. 748 (E.D. Mich. 1986), (physician who is dismissed from residency program has no right to be present at meeting at which faculty decided to dismiss him for academic reasons).

The majority's holding that the respondent herein was denied due process is inconsistent with Board of Curators and its

progeny. The decision regarding respondent was a cumulative one which took into account her OKAP score, her evaluations, and the views of the attending physicians who were her teachers.

It is true that the students in Board of Curators and the other cases cited above received more elaborate process than respondent did. However, respondent had a lot less at stake than those students. Respondent was not dismissed from the program and has gone on to pursue her chosen medical specialty. As this Court noted in Board of Curators, the severity of the deprivation is one of the factors to be considered when deciding what kind of procedure due process requires. Id. at 86, n.3, citing, Mathews v. Eldridge, 424 U.S. 319 (1976). Consequently, our discussion supra, at pages 34-35, concerning the unimportance of respondent's interest in the chief residency, is related to determining

whether she got due process. Brown v. Brienen, 722 F.2d 360, 365 (7th Cir. 1983).

Due process does not not necessarily require a pre-deprivation hearing in each and every situation. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542, n. 7 (1985); Ingraham v. Wright, 430 U.S. 651 (1977); Chernin v. Welchans, 844 F.2d 322, 326 (6th Cir. 1988); Augustine v. Doe, 740 F.2d 322, 328, n. 8 (5th Cir. 1984). Two Circuit Courts have held that, when a person has an interest that only minimally qualifies as a property interest, due process does not require a pre-deprivation hearing, and a post-deprivation hearing will suffice. Ramsey v. Board of Education of Whitley County, 844 F.2d 1268 (6th Cir. 1988) (school teacher whose sick leave balance was reduced from 142 to 29 days was not deprived of due process because she could challenge this action in a state breach of

contract action);[4] Boucvalt v. Board of Commissioners, 798 F.2d 722, 730 (5th Cir. 1986) (physician whose contract to provide anesthesiology services at a hospital was terminated was not denied due process because he could challenge the termination in a contract action).

Here, assuming arguendo that respondent (1) had a property interest, and (2) was entitled to some kind of pre-deprivation hearing, the evaluation that preceded the denial of the chief residency satisfied due process because of the academic nature of the decision and the relative lack of importance of the interest involved. However, even if this hearing was, by itself, not sufficient, the entire panoply of process available to petitioner was sufficient

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[4] A loss of 113 sick days is a greater pecuniary loss than is a loss of $675.00, the amount lost by respondent as a result of not being made chief resident.

to satisfy due process. Petitioner could have challenged the determination regarding the chief residency in a state contract action or in a proceeding brought under Article 78 of the New York State Civil Practice Law and Rules. In determining whether the pre-deprivation procedures which are followed before a person is deprived of liberty or property satisfy due process, one must consider the availability of post-deprivation remedies. Where a pre-deprivation hearing is required, a post-deprivation hearing, by itself, will not satisfy due process, but the availability of a post-deprivation hearing will insure the constitutionality of an informal pre-deprivation hearing. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 545, 546-548 (1985); Ingraham v. Wright, 430 U.S. 651, 678, n. 46 (1977); Matthews v. Eldridge, 424 U.S. 319, 339, 343 (1976); Williams v. Wallis, 734 F.2d 1434 (11th Cir.

1984); D'Acquisto v. Washington, 640 F. Supp. 594, 614-615 (N.D. Ill. 1986).

## CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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